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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

ROBERT KEITH CARTER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 322

BUELL HENLEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. .....

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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OPINIONS BELOW.

1. (a) The unofficial reports of the opinions below are these: Opinion of the United States Court of Appeals for the Eighth Circuit: *Robert Keith Carter, Appellant,* v. *United States of America, Appellee,* No. 17254; *Buell Henley Appellant,* v. *United States of America, Appellee,* No. 17259. (May 20, 1964, not yet officially reported); Memorandum

opinion of the Honorable John W. Oliver, Judge of the United States District Court for the Western District of Missouri, Southern Division, overruling defendants' separate motions for new trial (not reported). These opinions are appended hereto as provided in I subparagraph (i) of Rule 23 of this Court.

(b) (i) The date of the judgment sought to be reviewed is May 20, 1964, and the time of its entry is June 29, 1964.

(ii) Motion for rehearing in the above causes was overruled by the United States Court of Appeals for the Eighth Circuit on June 15, 1964. Mandate filed June 29, 1964.

JURISDICTION.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment, decree and opinion of the United States Circuit Court of Appeals for the Eighth Circuit is Title 28, U.S.C., Section 1254.

QUESTIONS PRESENTED.

(c) The questions presented for review (the questions are the same in both of the above cases), are these:

(i) Did the United States Court of Appeals for the Eighth Circuit decide a federal question in a way in conflict with applicable decisions of this Court, and particularly that of *District of Columbia* v. *Armes*, 107 U.S. 519, in affirming a judgment of conviction in a criminal case of the United States District Court for the Western District of Missouri wherein, the District Court admitted, over defendants' objection, the testimony of a government witness against de-

fendants, who "had an unclear memory of events", and whose testimony, in the language of the trial court, "strengthened the government's case."?

(ii) Did the United States Court of Appeals render a decision in conflict with the decision of another Court of Appeals on the same matter?

(iii) Has the Court of Appeals decided an important question of federal law which has not been, but should be settled by this Court in promulgating a new rule of evidence, when the Court of Appeals stated (op. pp. 3, 4): "The effect of appellants' contention here is that the abstruse psychiatric concepts of mental ailment or illness which some courts have recently been accepting as providing a standard for whether an accused is lacking in criminal capacity and responsibility should be made applicable to the witnesses in a criminal case so as to require that their capacity to testify against accused be resolved on the same basis. We have not in this Circuit accepted this loose and unobjective standard as a basis for measuring criminal capacity * * *."

CONSTITUTIONAL PROVISIONS AND REGULATIONS.

(d) The Constitutional provisions, statutes and regulations involved are:

Amendment V of the Amendments to the Constitution of the United States, Amendments 1 and 5, U.S.C.A. Constitution.

Rule 26, Federal Rules of Criminal Procedure, 26 U.S.C.A., p. 444.

(The pertinent text of the above is set forth in an appendix.)

STATEMENT OF THE CASE.

(e) Defendants were convicted in the United States District Court for the Western Division of Missouri of the violation of Title 26, U.S.C., section 4704(a), on charges of purchasing and possession of narcotic drugs not in or from the original stamped package; of selling, and transferring, in violation of U.S.C., section 4705(a), narcotic drugs not in pursuance of a written order form issued by the Secretary of the Treasury; and of conspiring, in violation of 18 U.S.C. to commit the foregoing convictions. A five year sentence was imposed on each conviction as to each defendant, to run concurrently. During the trial of the case, the government, over the objections of defendants, offered in its case against defendants a witness Hines, who had been confined for mental observation in the Springfield Medical Center in a former proceeding against the said Hines. The evidence of the medical experts as to the witness was that Hines *"has an unclear memory of events* particularly concerning his offense which may be due to a partial amnesia as a part of his mental illness." The trial judge, disturbed over the admission of this testimony, finally admitted it. Motions for new trial were filed and overruled by the trial judge in a memorandum opinion appended hereto. The United States Court of Appeals for the Eighth Circuit affirmed, in the opinion here sought to be reviewed and appended hereto. Petitioners, in the court of first instance and in the United States Court of Appeals for the Eighth Circuit urged that the court's action in admitting the suspect evidence, which evidence "strengthened the government's case" was in violation of defendants' rights under Amendment V of the Amendments to the Constitution of the United States, in denying defendants due process of law.

BASIS FOR FEDERAL JURISDICTION.

(g) The statement of the case under (e) above shows the basis for federal jurisdiction in the court of first instance, in that defendants were charged in that court with the violation of the statutes therein set out.

ARGUMENT.

(h) The opinion and decision here sought to be reviewed is in direct conflict with the controlling decision of this Court in *District of Columbia* v. *Armes*, 107 U.S. 519, 522. Therein, *two criteria*, are established both of which must be met to allow the testimony of one whose sanity is suspect, they are:

First, that he have sufficient understanding to apprehend the obligation of an oath—this first requirement goes to his capacity as a witness at the time he is testifying; Second, and this requirement is as important, or more important than the first "*and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue.*" Put otherwise, 107 U.S. 521, "* * * *nor from giving a perfectly accurate and lucid statement of what they have seen or heard*". It is nowhere challenged but that the witness Hines "has an unclear memory". Certainly, a man with an unclear memory may not meet the second requirement of "giving a correct account of the matters which he has seen or heard"—his "unclear memory clearly renders him incompetent on the second requirement." Even Wigmore, Third Edition, §494, p. 578, cited in the decision and opinion below, at page 587, states that the capacity to recollect is an essential part of the idea of testimonial qualification. Wigmore, cited by the court

below, would allow the jury not the court to determine the competency of a witness, and to winnow the chaff of nonsense and unbalance from any lucid, *remembered* matters of fact, if any, of an obviously incompetent witness, thus allowing the jury to determine matters of law, not of fact.

The court below follows Wigmore, not *Armes*. The Court below has emasculated that pre-requisite to testimonial qualification by disregarding entirely the unquestioned fact that the witness with an unclear memory, did not have the capacity to recollect, and could not give a correct or an accurate, lucid account of what he had seen or heard. This Court should grant certiorari for the first reason that the decision below is in conflict with Armes, and for the second that the decision of the court below has so muddled the issues and questions involved that it creates a federal question which has not after the opinion below, but should be decided by this Court, if only to the end that the rule in Armes be reiterated, that the courts under the supervision of this Court shall follow and not attempt to distinguish or disregard its doctrines.

Further, Rule 26 of the Federal Rules of Criminal Procedure states that "The competency * * * of witnesses shall be governed * * * by the principles of the common law as they may be interpreted by courts of the United States in the light of reason and experience. This merely states in other words the holding in *Armes, supra*, that it is a "question to be determined by the court." Here, the court of first instance, and the Court below, affirming *submitted the question of competency to the jury*. It is a denial of due

process under Amendment V of the Constitution of the United States.

Respectfully submitted,

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Attorneys for Petitioners.

OPINIONS.

The opinions below are here appended pursuant to Rule 23, Section 1, subparagraph (a).

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,254.
Robert Keith Carter,
Appellant,
vs.
United States of America,
Appellee.

No. 17,259.
Buell Henley,
Appellant,
vs.
United States of America,
Appellee.

Appeals from the United States District Court for the Western District of Missouri.

[May 20, 1964.]

Before JOHNSEN, Chief Judge, and MATTHES and RIDGE, Circuit Judges.

JOHNSEN, Chief Judge.

Carter and Henley, the appellants here, were convicted on charges of purchasing and possessing, in violation of 26 U.S.C. §4704(a), narcotic drugs not in or from

the original stamped package; of selling and transferring, in violation of 26 U.S.C. §4705(a), narcotic drugs not in pursuance of a written order on a form issued by the Secretary of the Treasury; and of conspiring, in violation of 18 U.S.C. §371, to commit the foregoing offenses. A five-year sentence was imposed on each conviction, with the three sentences of each appellant being made to run concurrently.

Reversal is sought on two contentions: (1) That on his medical history a Government witness named Hines was incompetent to give testimony as a matter of law, and the admission of his testimony was as to all of the charges involved prejudicial, and was a violation of due process; and (2) that even with Hines' testimony received and credited, the evidence still was insufficient to support the conviction of conspiracy. We have stated the contentions in inverse order to that of the briefs for purposes of our discussion.

On the facts shown by the record, the contention that the Court was legally required to hold Hines incompetent to give testimony is without any merit. Indeed, for the Court to have so held would have been for it to make departure from the rule and principles which have been regarded as firmly settled in the federal judicial system ever since *District of Columbia* v. *Armes*, 107 U.S. 519, 27 S.Ct. 840, 25 L.Ed. 618 (1882). The opinion in that case is so definitive and comprehensive that no problem has existed in relation to it, as an examination of Shepard's Citations will demonstrate, and there has not been need since for the Supreme Court to speak upon the question.

In Mr. Justice Field's language of that day, 107 U.S. at 521-522, "The general rule * * * is that a lunatic or a person affected with insanity is admissible as a witness if

he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court * * *".

The opinion makes quotation from Chief Justice (Lord) Campbell's simple declaration in *Reg.* v. *Hill*, 5 Cox, Crim. Cas. 259, that 'The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? * * * (I)f he can stand the test proposed, the jury must determine all the rest". 107 U.S. at 523.

The Model Code of Evidence of the American Law Institute (approved and adopted in 1942) makes expression of the rule in more modern terms (Rule 101, p. 91): "Every person is qualified to be a witness as to any material matter unless the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so far as to be understood by the judge and jury * * *, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth".

The effect of appellant's contention here is that the abstruse psychiatric concepts of mental ailment or illness which some courts recently have been accepting as providing the standard for whether an accused is lacking in criminal capacity and responsibility should be made applicable to the witnesses in a criminal case so as to require that their capacity to testify against the accused be resolved on this same basis.

We have not in this Circuit accepted this loose and unobjective standard as a basis for measuring criminal capacity and responsibility on the part of an accused. But

even where this has been done, it could not afford a basis for the projection of these theoretical concepts on criminal responsibility into the unrelated and practical field of what judicial experience has found to be the most useful and satisfactory test of witness competency for trial purposes—the capacity to communicate relevant material and to understand that there is an obligation to do so truthfully. Such a projection as is here sought would be to push back the law of witness competency in this respect to where it was a little over a century ago. See II Wigmore on Evidence (3d Ed. 1940) §492 et seq.

It should be sufficient merely to suggest a considered reading of the *Armes* opinion, but the following cogent excerpt may be set out demonstratively: "But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court [to hold a witness disqualified to testify] is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard". 107 U.S at 521.

As to the competency of Hines to be permitted to testify in the situation here involved, we are unable to see any possible question. His testimony was as to conversations which he had with appellant Henley in the Jackson County jail, at Kansas City, Missouri. These occurred within a day or two after Hines had been returned to the custody of the District Court at Kansas City from the

Medical Center for Federal Prisoners, Springfield, Missouri, where he had been sent for an examination during a 90-day period as to his mental condition, under 18 U.S.C. §4244, in relation to a motion for vacation of the probation which had previously been granted him on his conviction of violation of the Dyer Act, 18 U.S.C. §2312.

The reports of the warden and psychiatric staff of the Medical Center noted that Hines had a history indicative of some mental illness over a period of several years, but declared that he was presently competent to understand the proceedings against him and to consult with his attorney. Revocation was made of Hines' probation and the Court sentenced him to a term of 18-months imprisonment, with a recommendation that he be permitted to serve the sentence at the Springfield Medical Center. He made service of the sentence there; was released as a prisonr in regular course; had been out for about a year at the time of the trial here involved; and wa then, and had been for a period of six months preceding, regularly employed as "fleet manager" for a chain of filling stations in California. His testimony appeared to be clear, direct, and without any aspect of confusion. Indeed, so far as a reading of the record is concerned, he gave no indication of any mental impairment whatever.

The Court, in entrusting to the jury the evaluation of his credibility and the weight of his testimony, placed before it the history of his Springfield confinement and the expressions of the medical staff in relation thereto, and gave the jury full cautionary instructions. If appellants will review the far stronger fact-situation involved in the *Armes* case, they should have no difficulty in recognizing the utter lack of basis for any challenge to the Court's right to permit Hines to testify here.

Appellants' second contention as to the insufficiency of the evidence to support the conviction of conspiracy is also without merit. In view of their two other concurrent terms, their attack upon the conspiracy conviction would be entitled to be completely ignored, since it could gain them nothing in right to release. *Hiaraboyashi* v. *United States*, 320 U.S. 81, 85, 63 S.Ct. 1375, 1378, 87 L.Ed. 1774; *Dranow* v. *United States*, 8 Cir., 307 F.2d 545; *United States* v. *Millox*, 2 Cir., 246 F.2d 486. In order to foreclose the matter against the possibility of collateral attack for any subsequent purpose, such as habitual criminal punishment, we have chosen to deal with it adjudicatorily.

Hines testified to statements or admissions made to him by appellant Henley in the Kansas City jail, as to how the narcotics involved had been obtained by Henley, as to the entrustment of their possession to appellant Carter, and as to the understanding between himself and Carter in relation to them. This was done in an effort to induce Hines, who knew nothing previously about the matter, to assist in effecting disposition of the narcotics, on Henley's supposition that Hines was going to be released on bail. Hines communicated the information to the federal authorities.

A narcotics agent named Dino thereupon approached Carter, stated that Henley had requested him to pick up the narcotics, and offered to pay Carter the amount which Henley had told Hines that Carter was to receive out of the deal. Carter accepted the money, turned over the narcotics, and in his conversations with Dino corroborated what Henley had said as to how the narcotics had been acquired and as to the understanding which existed between them. Other actions in which Carter engaged during Dino's contact with him also confirmed the existence

and nature of the understanding and relationship between the appellants. There were other circumstances in the evidence which further lent support to the things which Henley and Carter had told Hines and Dino and to the fact of the conspiracy.

It is not necessary to set out the details of the evidence. It clearly afforded a competent and adequate basis for the jury to find that there had been an understanding and relationship between Henley and Carter, which amounted to a conspiracy under the narcotic laws, and as to which overt acts had been done in furtherance or execution of the unlawful scheme. And, of course, the fact that the indictment alleged that there were others involved in the conspiracy, which the Government failed to prove, would not prevent the conviction of Henley and Carter for their proved participation therein. *Ferina* v. *United States*, 8 Cir., 302 F.2d 95, 103.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Mandate filed in District Court June 29, 1964.)

EXHIBIT B.

Judgment.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17259

Buell Henley,
Appellant,

vs.

United States of America

APPEAL FROM the United States District Court for the Western District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Buell Henley surrender to the custody of the United States Marshal for the Western District of Missouri, if not now in custody in execution of the judgment and sentence imposed upon him, within 30 days from and after date of the filing of our mandate in the said District Court.

May 20, 1964.

Entered in accordance with opinion
Robert C. Tucker,
Clerk, U. S. Court of Appeals, 8th Circuit

Judgment.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17254

Robert Keith Carter,
Appellant,

vs.

United States of America

APPEAL FROM the United States District Court for the Western District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Robert Keith Carter surrender to the custody of the United States Marshal for the Western District of Missouri, if not now in custody in execution of the judgment and sentence imposed upon him, within 30 days from and after date of the filing of our mandate in the said District Court.

May 20, 1964

Entered in accordance with opinion
Robert C. Tucker,
Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,
vs.
ROBERT KEITH CARTER and BUELL HENLEY, Defendants.
No. 21286

Order Overruling Defendants' Separate Motions for New Trial.

(Filed December 7, 1962.)

Both defendants have filed separate motions for new trial. We have carefully considered the briefs. We are of the opinion that both motions should be overruled.

We believe that counsel and the Court of Appeals, should an appeal be taken, are entitled to know the reasons for our action on these motions.

So far as the sufficiency of the evidence is concerned, and considering only the evidence adduced by witnesses other than witness Hines (whose competency we will later discuss in detail), I stated in my charge to the jury that:

> "In this case, there are many facts about which there is obviously little conflict. Certainly, defendant Henley left a package with defendant Carter. Certainly, the Narcotics Bureau received certain information in Kansas City. It is certain that witness Dino came down to the Country Club Tavern. It is certain that defendant Carter and witness Dino got

the sack. It is certain that the sack left the car and ended up somewhere else. There is no dispute as to what was in the sack. There is very little dispute that at least some of the bottles came from the drug store.

"There is no dispute in this case that there were no stamp taxes paid on those narcotics.

"There is no real dispute that the defendant Carter was arrested on December 3, 1960. There is no real dispute that $150.00 changed hands. When and under what circumstances, as in regard to all of the general outline that I have stated, present very sharp conflict of evidence, as to what was said and who said it, and these, ladies and gentlemen of the jury, are for your resolution as to who is telling the truth."

No objection was entered to any portion of the charge and we must therefore assume that what was there stated was not only a fair summation at the time of trial but that it is still a fair summation of the evidence. I thought it was then and I think it is now. It follows that I am of the opinion that a case was made for the jury and that when the evidence of Hines is added to the other evidence it is not difficult to understand why the jury found as it did. While I think there was sufficient evidence to go to the jury without Hines' testimony, I think it obvious that Hines' testimony strengthened the Government's case.

In regard to witness Hines, counsel for the defendants suggest, and quite correctly so, that at one point in the trial the Court expressed concern about the question of witness Hines' competency. I think the manner in which that concern was laid to rest is important and that a short statement of the manner in which the question of compe-

tency arose will help place the problem and its resolution in perspective.

I requested the court reporter to transcribe her notes in order that the facts be accurately stated.

The transcript shows that witness Hines was called as the Government's first witness. While I knew from the opening statements that the evidence would develop that Hines and Henley had been transported from Springfield to Kansas City in the same car I did not know that Hines had been in the Medical Center until Hines testified. Quite early in his testimony he stated that he was "being transported from the Medical Center to the Jackson County Jail in Kansas City" but no particular point was then made as to why he was there. On Mr. Huffman's cross-examination, the Medical Center was again mentioned incidentally at the start of his cross-examination but it was not until the latter part of the cross-examination was the question asked, "Why were you sent to the Medical Center instead of some penitentiary?" The witness answered, "Observation", and the following line of questions and answers were given:

"Q. For psychiatric treatment?

A. Yes, sir.

Q. And the reason you were sent down there to the Medical Center was because of mental trouble?

A. I was sent there for observation.

Q. Well, were you under observation all the time you were there?

A. I was.

* * *

Q. How long had you been out there?

A. I was under 90 days observation.

Q. At the Medical Center before you claim you ever had any conversation with Henley you were out there

for a 90-day observation because of mental illness, weren't you?

A. I was there just for observation.

Q. Well, what were they observing you for, Mr. Hines?

A. To see if there was any mental illnesses."

It was at that time that the question occurred to me as to whether Hines had been committed for examination under Section 4244 of Title 18, United States Code, which would have meant that someone had "reasonable cause to believe (that he) may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense"; or whether he may have been committed under Section 4246 by some trial court that had actually found that he "was mentally incompetent" and that he might not have fully understood exactly why he had been committed.

Mr. Allen's cross-examination did not touch the question as to why he was at the Medical Center but Mr. Hamilton's redirect examination opened with the leading question that Hines had been "at the Medical Center on 90-day examination".

At this point the transcript shows the following occurred:

"THE COURT: I think this matter ought to be clarified as to how and why he was down there. It came up on both direct and cross-examination. The Court also would like to know. Do you have the records here whether that was a 4244 commitment and then returned back up—

MR. HAMILTON: Yes, I believe it was. I will check through on the recess. But he was down here for 90 days observation

THE COURT: Clarify who he was brought before."

Both Mr. Huffman and Mr. Allen asked the usual "just one more question" and Mr. Hamilton then requested the Court "to take judicial notice that this defendant was sent down to the Medical Center under §4244 for 90 days before revocation of probation and sentence".

At this point, the Court declared a recess, the time being 3:15 p.m., and counsel will recall that in chambers and out of the presence of the jury I insisted that the Government obtain and furnish the Court the full record concerning Hines' commitment to the Medical Center so that it could determine the actual facts. The Government was ordered to make those records available to the Court at the earliest possible moment. After recess I advised the jury that "no further questions will be asked of Mr. Hines" and I further told the jury that "the Court may make an announcement clarifying some questions that came up both on direct and cross-examination at a later time". I further granted defense counsel the opportunity to make further objections in regard to witness Hines and Mr. Huffman's statement that "we will make it in the morning" reflected Mr. Hamilton's assurance that the records of Hines' commitment would be made available to the Court so that it could study the same that evening.

Counsel will recall that all of the records relating to Hines' commitment were furnished the Court; that the Court did study them; and that before the resumption of trial the next morning I advised counsel that I felt the full factual situation should be laid before the jury, designating the records I felt should be presented to the jury, and the matter was fully disoussed by all counsel.

Counsel for the defense, of course, did not waive their basic objection to Hines' competency but all counsel agreed that the documents designated did reflect the full factual circumstances.

The transcript shows that accordingly and before any witness was put on the stand I stated the following to the jury:

> "Ladies and gentlemen of the jury, you will recall that in connection with the testimony of the Government's witness Hines, the Court advised you that I would attempt to work out with counsel for both sides exactly what the factual situation was, as the court records and other records reflect, in regard to how Mr. Hines was at the Springfield Medical Center, and under what type of order he was committed.
>
> "I have before me copies of the court records and I will explain those to you. They will be marked as exhibits and counsel for both sides have indicated that the procedure to follow to best clarify this situation is for me to simply read these and to give you such explanation so that you can understand."

I then advised the jury that Judge Smith had placed witness Hines on probation on a plea of guilty on April 1, 1957; that by his order of May 13, 1960, in connection with a motion to revoke the probation, Hines was committed to Springfield under Section 4244; I read that order to the jury; I read Dr. Settle's letter of August 9, 1960 to the jury; I read the report of the psychiatric staff examination of August 8, 1960 to the jury; I read Judge Smith's order of September 2, 1960 revoking probation to the jury; and I then advised the jury as to Hines' actual commitment to Springfield by the Attorney General on the recommendation of that institution by Judge Smith. I then stated to the jury:

"I think with that explanation you can understand exactly the proceedings under which Mr. Hines was in Springfield and how he happened to go back to Kansas City and was awaiting in the Jackson County jail being called before the Court for the hearing that was held on September 2.

"Is there any additional statement, gentlemen, that you think should be made in connection with it, or does that adequately cover it?"

No counsel made any additional suggestion. Thereafter and after the Government rested I afforded counsel for the defense the opportunity to make further objection at which time counsel for both defendants moved to strike from the record the testimony of witness Hines "for the reasons previously assigned during the course of trial and in addition thereto for the further reason that said witness Hines, as shown by the evidence now in this Court, is an incompetent witness to testify".

In regard to the question of witness Hines' competency, the Court stated:

"In regard to the question of competency of witness Hines, the records show that a question was raised as to his competency under Section 4244, but that upon examination he was determined sufficiently competent within the meaning of that section. The Court feels that there is sufficient evidence in the case that counsel may present the question of how much weight should be given to Hines' testimony in an adequate fashion that will protect the interests of the defendants."

In my charge to the jury I stated the following in regard to the testimony of witness Hines:

"The Court, with the cooperation of counsel for both sides, made certain that the facts in regard to

Government witness Hines were presented to you in an orderly fashion.

"Without intending to comment or in any way emphasize those facts, I think it will be helpful if the Court recalls that a real question was raised in connection with whether or not Mr. Hines was competent to understand the nature of the charge as to his probation revocation before Judge Smith and whether or not he would be able to assist counsel in connection with the legal proceeding in connection with that matter.

"The record shows that Judge Smith sent Hines to the Medical Center here at Springfield for examination and observation. The proper authorities expressed their judgment that Hines was competent for the purposes that I have stated, and Judge Smith so found when he imposed sentence. If there is any question that you have as to what those documents say and additional information, the exhibits that are in evidence can clarify.

"I would be reasonably certain, however, that this has been gone over enough, and the point that I would make, that while there is no adjudication of incompetence, nevertheless bear in mind that the question was raised.

"In this type of situation, consistent with the common law tradition, the Court expresses its confidence that you will judge carefully the manner in which this witness testified, the character of his testimony, his intelligence and appearance and state of mind and demeanor while on the stand, and every other matter in evidence which tends to indicate whether this witness's testimony is worthy of belief by you in the discharge of your duty."

In various ways, defense counsel suggest that the Court erred because witness Hines was incompetent to testify because of his mental incompetency.

The point of beginning is Rule 26 of the Rules of Criminal Procedure. It is there stated that: "The competency . . . of witnesses shall be governed . . . by the principles of the common law as they may be interpreted by courts of the United States in the light of reason and experience". As noted in *Lutwak* v. *United States*, 344 U.S. 604, 614 (1952), Rule 26 was but a paraphrase of Mr. Justice Stone's statement in *Wolfe* v. *United States*, 291 U.S. 7, 16 (1934). Cf. also *Funk* v. *United States*, 290 U.S. 371 (1933).

In *On Lee* v. *United States*, 348 U.S. 747, 757 (1952), in a narcotics case, the Supreme Court used language apposite to this case. It was there held:

> "The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact to judge the weight to be given it. . . . The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions. But to the extent that the argument for exclusion departs from such orthodox evidentiary canons as relevancy and credibility, it rests solely on the proposition that the Government shall be arbitrarily penalized for the low morals of its informers. . . . We think the administration of justice is better served if stratagems such as we have here are regarded as raising, not questions of law, but issues of credibility. We cannot say that testimony such as this shall, as a matter of law, be refused all hearing."

In his chapter on Mental Derangement, Wigmore, at the outset of his discussion in § 492, on page 583 of Volume II of the Third Edition, noted that "there was a period

(and it has not so long passed away) when the deranged and the defective, in the superstitious belief of earlier times, which regarded madness as an infliction sent from Heaven, were treated as incapable of being witnesses at all".

After giving supporting citations and quoting from Coke and Greenleaf, Wigmore continued:

> "But this indiscriminate rule of exclusion, since the progress in popular understanding of mental derangement and defect, has been modified and rationalized. While it is still attempted to draw a line which prevents certain classes of persons from being listened to at all—a doubtful policy in any case (*post*, § 501)—the law endeavors to make its tests fit the purpose. The question being whether the person is trustworthy as a witness, the law now asks whether *in each case* the derangement or defect is such as to make the person highly *untrustworthy as a witness*; it no longer excludes absolutely." (Emphasis the author's).

In the cited § 501 (page 594) of the same volume, Wigmore states:

> "The tendency of modern times is to abandon all attempts to distinguish between incapacity which affects only the degree of credibility and incapacity which excludes the witness entirely. The whole question is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible. . . . The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to discredit him when he is truly an imbecile or suffers under a dangerous delusion. It is simpler and safer to let the jury perform the process of measur-

ing the impeached testimony and of sifting out whatever traces of truth may seem to be contained in it."

We believe our action in connection with witness Hines was in accordance with the teaching above outlined. Our confidence in the soundness of that view is fortified by Judge Evans' decision in *Ross* v. *United States*, (7th Cir. 1937) 93 F.2d 950. In that case, as in this, the question of the particular witness's competency did not arise until he had been on the stand for some time. The witness in that case testified that he had actually been adjudged insane. But even in that factual situation, Judge Evans held that a motion to strike the testimony was properly denied because "the evidence merely bore on the credibility of the witness".

And finally, we believe the argument that the full conspiracy was not established against Hines and that Hines had "recanted" because he frankly stated on cross-examination that he had never intended actually to get involved in defendant Henley's and defendant Carter's agreement to violate the narcotics laws, is answered by the recent decision of the Eighth Circuit in *Ferina* v. *United States*, (8th Cir. 1962) 302 F.2d 95, 103-104 (cert. den. October 8, 1962, 31 Law Week 3116).

In that case four defendants were charged in Count IV of an indictment for conspiracy to violate §1503 of Title 18, United States Code. Judge Duncan sustained a motion for directed verdict as to one defendant. The Court of Appeals held the evidence to have been insufficient to convict as to another. But as to the two remaining defendants, the court held:

"In order to convict the defendants Ferina and Cardarella under Count IV, it was not necessary for the Government to establish that they conspired with

Young or Biase, or both. It would be sufficient if the Government established that Ferina and Cardarella conspired between themselves to do the acts set forth in Counts I and II. Since they were acting together in committing the acts charged in the substantive counts, the jury could properly find that they conspired to commit those acts."

Again, on page 104 of 302 F.2d, the court emphasized that "no connection was established" between all four of the defendants, but the court stated that "it is . . . clear that the fact that the evidence would not be sufficient to hold A criminally responsible would not exonerate C and D from their criminal responsibility".

In this case, by circumstantial evidence, a connection was established between Henley and Carter. Except for the existence of that connection, the Government would never have had sufficient information to do what it did. The fact that the conspiracy was revealed by Hines does not lessen the existence of that conspiracy between Henley and Carter.

The other questions raised by the motions and the suggestions filed in support have had our careful consideration but for the reasons stated the separate motions for new trial of both defendants shall be and are hereby overruled.

Counsel are also hereby advised that the defendants will be sentenced on December 17, 1962 in the Southern Division of this Court at Springfield, Missouri.

IT IS SO ORDERED.

/s/ John W. Oliver
District Judge

Kansas City, Missouri
December 7, 1962

APPENDIX D

Constitutional Provisions and Regulations

Amendment V of the Constitution of the United States, pertinently provides:

> "No person shall be * * * deprived of life, liberty, or property without due process of law * * *."

Rule 26, of the Federal Rules of Criminal Procedure, pertinently provides:

> "* * * The admissibility of evidence, and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 322

ROBERT KEITH CARTER AND BUELL HENLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted of narcotics offenses in the United States District Court for the Western District of Missouri and each was sentenced to imprisonment for five years. The convictions were affirmed by the court of appeals on May 20, 1964 (Pet. App. 8, 9). A petition for rehearing was denied on June 15, 1964. The petition for a writ of certiorari was not filed until July 24, 1964, and is therefore out of time under Rule 22-2 of the Rules of this Court.

There is no occasion for this Court to waive its rules; the petition does not in any event present an issue warranting review by this Court. The sole issue raised is the competency of the witness Hines, who testified to being approached by petitioner Henley with a request to assist in the disposition of narcotics. Hines reported the incident to the Narcotics Bureau and an agent, posing as an emissary from Hines, obtained narcotics from Carter.

Hines had been placed on probation for a violation of the Dyer Act in 1957. Probation was revoked in 1960 and Hines was sent to the Medical Center for observation on May 13, 1960 (Tr. 72-73). The psychiatric report of August 9, 1960, was that Hines was then competent, and that, while he presented a history of long-standing mental illness, it was impossible to know his precise mental condition as of 1957 (Tr. 74-75). The staff reported that Hines had "an unclear memory of events particularly concerning his offense which may be due to a partial amnesia as a part of his mental illness. There is a possibility that the amnesia is due to a desire not to remember unpleasant material" (Tr. 75). The offense to which that referred was the Dyer Act violation in 1957. As of the time of the report, August 9, 1960, it was stated that "Although the findings indicate mental illness over a long period of time, the Staff is of the belief that this man is able to consult with his lawyer with a reasonable degree of rational understanding and he has a rational as well as factual understanding of the proceedings against him" (Tr. 76).

It was while Hines was at the Medical Center for observation in August 1960 that he was approached by petitioner Henley to help dispose of narcotics (Tr. 8). Hines reported this conversation to his attorney and to a narcotics agent (Tr. 14). By the time Hines testified at the trial in August 1962, he had completed the sentence imposed on revocation of probation (Tr. 16). As is more fully discussed in the opinion below (Pet. App. 1-7) and the opinion of the district court (Pet. App. 10-21), there can be no serious question of the competency of Hines as a witness. Petitioners' challenge to this ruling is based on the report of Hines' "unclear memory" as to events in 1957. The report itself indicates that this was probably due in part to Hines' desire to forget his own difficulties. It in no way suggests that he was unable to recall the events that occurred in 1960—matters which he immediately communicated to his lawyer. In short, the matter has been carefully appraised by the courts below and there is no reason for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

AUGUST 1964

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